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IN THE

Supreme Court of the United States

PELLA CORPORATION AND
PELLA WINDOWS AND DOORS, INC.,
Petitioners,

v.

LEONARD E. SALTZMAN, KENT EUBANK, THOMAS RIVA, AND WILLIAM AND NANCY EHORN, individually and on behalf of all others similarly situated,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Product Liability Advisory Council ("PLAC") respectfully submits this brief as *amicus curiae* in support of petitioners Pella Corporation and Pella Windows and Doors, Inc. ("petitioners").[1]

STATEMENT OF INTEREST

PLAC is a non-profit association with over 100 corporate members representing a broad cross-section of American and international product manufacturers.[2] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sec-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioners and Respondents, upon timely receipt of notice of PLAC's intent to file this brief, have consented to its filing. Petitioners have filed with the Clerk of the Court a letter granting blanket consent to the filing of *amicus* briefs, and Respondents' written consent accompanies this brief.

[2] A list of PLAC's current corporate membership is attached to this brief as Appendix A.

tor. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed more than 800 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability.

PLAC members have an interest in the ruling below because the Seventh Circuit's apparent endorsement of "issues classes" as a back door around the Rule 23 predominance requirement will likely trigger an avalanche of class action litigation. If allowed to stand, the ruling thus has the potential to dramatically increase the class action exposure of PLAC's members and all companies doing business in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a consumer class action with only one common issue: the consumers bought petitioners' windows, which are alleged to be defectively designed. In a per curiam opinion issued without any opportunity for merits briefing or oral argument, the Seventh Circuit affirmed an order certifying two classes of consumers – despite agreeing that individual issues predominated on the questions of causation and injury. In the Seventh Circuit's view, these admittedly individualized issues need not stand in the way of a limited trial on one "common issue": "whether the windows suffer from a single, inherent design defect leading to wood rot is the essence of the dispute and is better resolved by class treatment." *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010).[3] The court's erroneous ruling departed from the sound reasoning of several other circuits, which have expressly held that a court may not use "issues classes" to manufacture predominance where it is otherwise lacking.

This Court should grant review. The Seventh Circuit's ruling deepens an existing split between the

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[3] The district court had certified two classes: (1) a nationwide non-opt-out class under Rule 23(b)(2) of owners of "windows [that] have not manifested the alleged defect [or] whose windows have some wood rot but have not yet been replaced," and (2) a Rule 23(b)(3) "statutory consumer fraud class, consisting of the following six state subclasses: California, Florida, Illinois, Michigan, New Jersey, and New York, for all members whose windows exhibited wood rot and who have replaced the affected windows." *Saltzman v. Pella Corp.*, 257 F.R.D. 471, 487 (N.D. Ill. 2009).

Fourth and Fifth Circuits – which have held that issues classes cannot be used where predominance is otherwise lacking – and the Second and Ninth Circuits – which have allowed district courts to use issues classes to isolate common issues for trial regardless of whether the case as a whole satisfies Rule 23(b)(3)'s predominance requirement. Without this Court's intervention, federal court litigants will be subject to widely divergent class-certification standards based solely on where a suit is filed.

The Court's intervention is all the more appropriate because the Seventh Circuit joined the wrong side of the split. That court's decision should be reversed for at least three reasons. First, the Seventh Circuit's ruling is contrary to the text, structure and intent of Rule 23(b)(3), which expressly requires that a finding of predominance be made after accounting for "*any* questions affecting only individual members" – not simply those on which a court elects to focus in an issues trial. The trial court disregarded this requirement by dissecting the proposed class in order to find one issue that was ostensibly common, even though individualized issues predominated overall – and the Seventh Circuit erred in endorsing that circumvention of Rule 23(b)(3).

Second, the Seventh Circuit's ruling portends serious constitutional violations in this and other cases. Remarkably, the court ignored its own prior admonition that district courts must be careful to "carve at the joint" in slicing up class-action trials into common and individual phases. Otherwise, a subsequent jury may be called upon to reexamine facts decided by prior juries, in violation of the Reexamination

Clause of the Seventh Amendment. That is likely to happen here. After all, the only "common" issue identified by the courts below to be tried by a jury in the class trial is whether petitioners' windows are defective. But in order to resolve causation issues – i.e., whether the defect was the cause of any alleged damages – subsequent juries would almost certainly have to reach their own findings about the nature of the defect.

Third, the Seventh Circuit's loose approach to class certification is an open invitation for plaintiffs' attorneys across the country to patch together eclectic groups of claimants into proposed classes – free from any concern over whether common questions would predominate in litigating the class claims. If allowed to stand, the Seventh Circuit's decision will thus have destructive effects on businesses nationwide, as plaintiffs will flock to its district courts with similar class actions.

For all of these reasons, the Court should grant the writ.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT AMONG THE CIRCUITS REGARDING THE PROPER USE OF ISSUES CLASSES.

Rule 23(b)(3) indicates that a class action may only be maintained where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to

other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23(c)(4), on the other hand, states that "*[w]hen appropriate*, an action may be maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4) (emphasis added).[4]

Courts are divided over the precise relationship between the predominance requirement of Rule 23(b)(3) and the authorization of issues classes in Rule 23(c)(4). The majority view – and the better one – is that predominance must be satisfied with respect to the class as a whole before an issues class may be considered. *See* Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:43 (6th ed. 2009) (collecting authority adhering to this "majority position"). The Fourth and Fifth Circuits subscribe to this view, as do many district courts. *See, e.g.*, *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998) ("reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3)"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues"); *Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993) ("While . . . dis-

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[4] Although the Seventh Circuit opinion does not explicitly say that it is affirming certification of "issues classes" under Rule 23(c)(4), that is the practical implication of the ruling.

trict courts may separate and certify certain issues for class treatment, the 'subclass' on each issue still 'must independently meet . . . at least one of the categories specified in subsection 23(b)'"); *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 190 (E.D. Pa. 2007); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003); *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 496 (E.D. Pa. 1997). As the Fifth Circuit succinctly put it: "district court[s] cannot manufacture predominance through the nimble use of subdivision c(4)." *Castano*, 84 F.3d at 745 n.21.

The other view – taken by the Second, Ninth and (now apparently) Seventh Circuits – is that district courts may use issues classes to isolate common issues regardless of whether common issues predominate in the class as a whole. *See In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) ("[A] court may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement."); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) ("Even if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court . . . to isolate the common issues under Rule 23(c)(4)[ ] and proceed with class treatment of these particular issues").

Notably, even the circuits that have espoused liberal attitudes toward issues classes are in conflict with themselves. The Second Circuit, for instance, recently rejected certification of an "issues class" on the ground that it would do little to increase the effi-

ciency of the litigation. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (finding that issues classes would not "materially advance the litigation because [they] would not dispose of larger issues such as reliance, injury, and damages"). Similarly, the approach taken by the Seventh Circuit in *Pella* is in hopeless conflict with the Seventh Circuit's prior ruling in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), rejecting a similar issues trial. *See id.* at 1296-97 (reversing certification where trial judge used issues trial on general question of negligence as an alternative for Rule 23(b)(3), stating that the "innovative procedure" for streamlining the case "so far exceed[ed] the permissible bounds of discretion in the management of federal litigation as to compel . . . decertification").

In sum, "[t]he interaction between the requirements for class certification under Rule 23(a) and (b) and the authorization of issues classes under Rule 23(c)(4) is a difficult matter that has generated divergent interpretations among the courts." *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 200 n.25 (3d Cir. 2009). The Court should grant certiorari in this case and harmonize those "divergent interpretations."

II. THE SEVENTH CIRCUIT'S RULING IGNORES THE TEXT AND INTENT OF RULE 23, THREATENS CONSTITUTIONAL RIGHTS AND IMPERILS AMERICAN BUSINESS.

A. The Ruling Abrogates The Language And Intent Of Rule 23.

The Seventh Circuit's ruling that a class may be certified as to certain purportedly common issues – even in the absence of predominance – is premised on a fundamental misreading of the relevant Rules. The plain language of Rules 23(b)(3) and (c)(4) supports the view of the majority of courts that Rule 23(c)(4) is a mere "housekeeping rule" to be applied, if at all, once predominance is satisfied as to the entire cause of action. *See Castano*, 84 F.3d at 745 n.21.[5] Rule 23(b)(3) expressly requires that common issues predominate over "*any* questions affecting only individual members" – vesting no discretion in courts to use issues trials to reshape the predominance inquiry. Fed. R. Civ. P. 23(b)(3) (emphasis added). Its plain language thus unambiguously indicates that it applies to the entire cause of action.

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[5] This analysis applies equally to Rule 23(b)(2). The majority of the Circuits – including the Seventh Circuit – have expressly recognized that Rule 23(b)(2) incorporates a cohesiveness requirement, which, like the predominance requirement of Rule 23(b)(3), bars class treatment unless "the case will not depend on adjudication of facts particular to any subset of the class nor require a remedy that differentiates materially among class members." *Lemon v. Int'l Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000); *see also, e.g., Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 n.18 (3d Cir. 1998) (stating that under Rule 23(b)(2) it is "well established that the class claims must be cohesive"); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006) (recognizing that a Rule 23(b)(2) class must be "sufficiently cohesive" for the class-action device to be employed); *Maldonado v. Ochsner Clinic Found.*, 493 F.3d 521, 524 (5th Cir. 2007) (similar); *In re St. Jude Med. Inc.*, 425 F.3d 1116, 1121-22 (8th Cir. 2005) (similar). Accordingly, a harmonious reading of Rules 23(b)(2) and 23(c)(4) similarly requires that courts assess whether the class as a whole is cohesive before any use of the Rule 23(c)(4) device is sanctioned.

The text of Rule 23(c)(4) does not purport to modify this requirement; to the contrary, it provides for issues trials only "[w]hen appropriate." And it does not purport to establish a separate set of requirements to guide the "appropriate[ness]" inquiry – strongly implying that issues trials are only "appropriate" where the other requirements of Rule 23 are satisfied. After all, had the drafters of Rule 23 intended to provide a stand-alone basis for class certification, they would have included the provision alongside the other Rule 23(b) subsections intended to do precisely that.

Any contrary reading of Rule 23 is nonsensical. The Seventh Circuit's reading, for example, would provide a free pass for every class action that contains a conceivably common question. This is not – and cannot – be the rule. If it were, courts would allow "automatic certification in every case where there is a common issue, a result that could not have been intended." *Castano*, 84 F.3d at 745 n.21.

The Committee Notes confirm that the drafters never intended Rule 23(c)(4) to operate in derogation of the predominance requirement as to the cause of action as a whole. For instance, the Notes specifically instruct that the class action device be used only where predominance exists: "The court is *required to find, as a condition* of holding that a class action may be maintained . . . that the questions common to the class predominate over the questions affecting individual members." Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966 amendment) (emphasis added). The Notes further state that "[a] court that is not satisfied that the requirements of

Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23(c)(1)(C) advisory committee's note (2003 amendment). And, if this were not clear enough, the Notes to Rule 23(c)(4) indicate that an issues class "may retain its 'class' character only through the adjudication of liability to the class." Fed. R. Civ. P. 23(c)(4) advisory committee's note (1966 amendment).

Commentators agree, moreover, that the provision should not be used as an end-run around the plain mandates of Rule 23. *See* Joel S. Feldman, *Attempting to Manufacture Predominance: Practical and Legal Concerns with Issue Certification Under Rule 23(c)(4)*, Class Action Litigation 2007: Prosecution & Defense Strategies (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 11372 (2007)); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 712 (2003). Rather, strict enforcement of the predominance requirement is necessary to ensure that class actions are conducted consistent with their purposes and with the substantive rights of the parties involved. After all, the class action procedure was devised to allow a single plaintiff to represent other individuals only when the representative plaintiff's claims have so much in common with all the other claims that the defendant's liability – or lack thereof – to the entire class can be fairly decided in a single proceeding. *See Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 877, 936-38 (1958). The Seventh Circuit's decision, however, did away with the predominance requirement – and the fairness principles on which it is based – by welcoming through the "issues class" back door the very result

that it barred at the front: certification of a class in which liability ultimately turns on individualized factual issues.

In sum, Rule 23(c)(4) was intended to be a mere "procedural tool" to sever common issues – not a "vehicle to reach certification." *Blain*, 240 F.R.D. at 190. The Seventh Circuit's decision runs afoul of that intent. If allowed to stand, it would ultimately render the predominance requirement a nullity, by allowing certification of virtually any proposed class under the guise of an "issues class" – even where common questions do not predominate. Such a result would contravene the language and intent of Rule 23 – and set the stage for proceedings that are inherently unfair and, as discussed in the next section, violate the Seventh Amendment.

B. The Ruling Threatens To Violate The Seventh Amendment Bar On Reexamination Of Facts Tried By A Jury.

The Seventh Circuit's loose approach to "issues classes" also threatens to compromise litigants' core constitutional rights. Because class actions typically cannot be neatly separated into distinct issues, the facts and law that are relevant to the supposedly "common" issue will frequently overlap with the remaining issues that are to be tried individually. This, in turn, would force the second jury to reexamine the findings of the first jury. By welcoming "issues classes" with open arms, the Seventh Circuit has thus set the course for routine violations of the Seventh Amendment – as well as this Court's

jurisprudence regarding reexamination of factual findings by successive juries. *See* U.S. Const. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any Court of the United States.").

This Court's landmark opinion in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), cautioned that a partial retrial limited to particular issues "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. In that case, the First Circuit found error in the district court's jury charge on the issue of damages as to the defendant's counterclaim, and it remanded for a partial new trial on damages only. This Court reversed, explaining that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.*

The courts of appeals have properly extended the principle annunciated in *Gasoline Products* to the bifurcation of class actions, warning district courts that they must be careful to "carve at the joint" when setting out to certify isolated issues for class treatment, while leaving individualized issues for later resolution by subsequent juries. *Castano*, 84 F.3d at 751 (quoting *Rhone-Poulenc*, 51 F.3d at 1302, with approval). Otherwise, separate juries considering overlapping issues will inevitably reach their own, potentially divergent findings on identical facts. *See, e.g., id.* Commentators have echoed these concerns

and approved the extension of *Gasoline Products* to the class-action context. W. Russell Taber, *The Re-examination Clause: Exploring Bifurcation in Mass Tort Litigation*, 73 Def. Counsel J. 63, 64 (2006) ("Yet perhaps the most significant obstacle to [issues classes] is the Constitution itself"); Feldman, *supra*, at 71 ("Perhaps the most significant problem with issue certification is the fact that it runs afoul of the Seventh Amendment's Reexamination Clause [where it] . . . causes a second jury to reexamine the findings of the jury that determined any common issues").

Application of the *Gasoline Products* rule in the class-action context furthers two important goals of the Seventh Amendment's bar on reexamination. First, overlapping factual and legal issues may confuse subsequent juries. *See Gasoline Prods.*, 283 U.S. at 500 ("Here the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial."). Second, there is a risk of inconsistent jury verdicts. *See Castano*, 84 F.3d at 750-51 ("[I]f separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent"); *Rhone-Poulenc*, 51 F.3d at 1303 ("How the resulting inconsistency between juries could be prevented escapes us.").

Contrary to its careful approach in *Rhone-Poulenc*, the Seventh Circuit's approach in this case throws caution to the wind, sacrificing important constitutional protections for the sake of imaginary expediency. Issues classes are fraught with reex-

amination risks – particularly where, as here, predominance is lacking as to the case as a whole. In this case, for instance, the district court plans to limit the "issues" jury to consideration of the factual and legal issues pertaining to alleged window defects. But even if a defect is found, how could a second jury decide whether the alleged defect caused any injury to any individual without some examination of the nature of the defect itself? A class member might have a leaky window, but is the leak caused by a defect in the window, or something else? And even if it is caused by a defect, is it the same defect that is "common" to the class? These questions cannot be answered without revisiting the first jury's findings.[6] Ultimately, "[n]o matter how carefully a judge attempt[s] to structure an issue class or craft special jury interrogatories to avoid overlap between factual issues, the sheer number of individual issues present in the absence of predominance as to the cause of actions as a whole [] create[s] confusion and uncertainty among jurors in the second (and subsequent) juries as to their proper role." Feldman, *supra*, at 74. Thus, in this case – and the many certain to follow – an "issues" trial could not be held without an unconstitutional reexamination of facts.

C. Loose Class Certification Standards Create Grave Risks For American Business.

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[6] Alternatively, there is a substantial risk that the second jury would simply assume that because a first jury found the product to be defective, every class member's window problems were caused by the alleged defect. That would be grossly unfair to the defendants, further highlighting the inherent problems of loosening certification standards for "issues" classes.

Finally, review is needed because the relaxation of class certification requirements contemplated by the Seventh Circuit's ruling in this case will incite potential plaintiffs – and their counsel – to file frivolous suits in the district courts of the Seventh Circuit (and beyond), creating a new opportunity for abusive class actions. This, in turn, will have widespread negative repercussions on American businesses and industries.

Pella has already been touted by plaintiffs' counsel as an invitation to file class action lawsuits that would not have previously been certified in the Seventh Circuit. *See* Aaron M. Zigler, *Pella v. Saltzman: The Seventh Circuit throws class certification objections out the window*, July 1, 2010, *available at* www.jdsupra.com (stating that "[u]nder *Pella*, it is clear that the existence of substantial individual issues will not defeat class certification"); Freed & Weiss LLC, "Firm Resume," *available at* www.freedweiss.com (listing *Pella* among the "notable cases" on its "firm resume" and noting that the Seventh Circuit authorized district courts to "devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues").

Lest there be any doubt, prior history reveals that the invitation will be accepted. As one commentator has noted: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings . . . . If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997). By allowing

meritless class actions to hide behind the veil of "issues classes," the Seventh Circuit is thus poised to become a destination for consumer fraud and other similar class actions that would have been rejected under prior class certification standards. The onslaught of baseless suits, moreover, will crowd out legitimate legal grievances, raising the overall costs of litigation and jeopardizing the fairness of the legal system. *See Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) (noting that "windfalls" awarded to plaintiffs bringing frivolous claims may cause those who actually suffered injury to receive "insufficient compensation").

Beyond these judicial costs, the Seventh Circuit's embrace of loose certification standards will have serious repercussions for American businesses. It is broadly recognized that loose certification requirements raise the stakes of litigation and the risk of gargantuan verdicts – not to mention bankruptcy. Mark Moller, *The Anti-Constitutional Culture of Class Action Law*, Regulation 50, 53 (Summer 2007) ("[L]oose certification standards are vulnerable to trial judges' political biases. A populist trial judge with a strong aversion to large corporations might, for example, want to punish big corporate interests, 'sending a message' that they must respect the little guy. Inaugurating a large class action, triggering reams of negative press and sending the defendant's stock price through the floor, is a good way to do so"). This is so regardless of the merits of the case; "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."

Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition). For this reason, "certification is the whole shooting match" in most cases, and defendants faced with improvidently certified, meritless lawsuits feel "intense pressure to settle" before trial, culminating in "judicial blackmail." *See* David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN's Product Liability Law & Strategy (Feb. 2009); *Rhone-Poulenc*, 51 F.3d at 1298 (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."); *Castano*, 84 F.3d at 746 ("These settlements have been referred to as judicial blackmail."). Abrogation of the predominance requirement substantially increases these risks to American business.

Finally, and most ironically, by inviting questionable consumer fraud class actions, the Seventh Circuit's ruling threatens to disrupt the free flow of commerce – to the ultimate detriment of consumers. This is so because the risk of bet-the-company class actions results in higher prices at the supermarket, the car dealership and the shopping mall – and can even force companies to scale back operations or stop selling valuable products. *See* Towers Perrin, 2009 Update on U.S. Tort Costs Trends 3 (2009) (reporting that the tort lawsuit industry cost Americans $254.7 billion in 2008). For this reason too, the Court should

grant certiorari, lest Seventh Circuit courts become the next haven for class action abuse, to the detriment of our judicial system, our economy and American consumers.

CONCLUSION

For the foregoing reasons, and for those stated by petitioners Pella Corporation and Pella Windows and Doors, the Court should grant the petition for a writ of certiorari.

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APPENDIX A

Corporate Members Of The Product Liability Advisory Council

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation

Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products

Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Segway Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Techtronic Industries North America, Inc.
Terex Corporation
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.

Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.